MEMBERSHIP
ADMINISTRATIVE CODE COMMITTEE

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Presiding Officer

Representative Diane Sands
Vice Presiding Officer

Senator Steve Doherty

Senator Dorothy Eck

Senator Walter L. McNutt

Representative Deb Kottel

Representative Gay Ann Masolo

Representative Paul Bankhead

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Published by:

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Henry C. Trenk Director, Office of Legislative Information Technology

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PART I

THE HISTORY, FUNCTION, AND ACTIVITIES OF THE ADMINISTRATIVE CODE COMMITTEE

The Administrative Code Committee, a permanent joint committee of the Montana Legislature, was established in 1975 by Title 5, chapter 14, part 1, MCA. The Committee consists of four members from the House and four members from the Senate. These members are appointed in the same manner as are standing committees of their respective houses of the Legislature. The presiding officer of the Administrative Code Committee is selected by the Committee members. During the biennium covered by this report, the staff of the Committee consisted of one staff attorney, employed by the Legal Services Office of the Legislative Services Division, who devoted approximately one-fifth of his time to Committee business. Five other staff members of the Division's Legal Services Office also provided services to the Committee on a part-time basis, primarily reviewing rules of administrative agencies. A Legislative Services Division secretary performed clerical tasks for the Committee.

The purpose of the Committee, as reflected in the statutes defining its powers and duties, is to review rules proposed and adopted by administrative agencies and filed with the Office of the Secretary of State under the provisions of the Montana Administrative Procedure Act (MAPA) and to generally oversee compliance with the requirements of MAPA. The Committee intends to serve: (1) as a body that provides routine review of executive agency rules; and (2) as a forum to which persons with complaints concerning Executive Branch rules and executive agency action founded on those rules may turn for less expensive and more timely solutions than court challenges to agency authority. For this reason, the Committee has sought to publicize its functions in the Montana Administrative Register (MAR), in rulemaking hearings, and in other forums.

It cannot be emphasized too strongly that MAPA does not grant substantive rulemaking authority to any agency. See 2-4-301, MCA.

Since publication of the Committee's Report to the 55th Legislature in November of 1996, the Committee has held two meetings to review rule proposal and adoption

notices published in the MAR, consider problems with the application of rules, hear testimony, and study specific topics. A schedule of Committee meetings and a summary of the matters discussed follow:

September 12, 1997, Meeting

- Elected Senator Larry Baer as Presiding Officer by a unanimous ballot
- Elected Representative Diane Sands as Vice Presiding Officer on a 4 to 3 secret ballot
- Approved that the Presiding Officer write a letter to Governor Racicot on behalf of the Committee to remind him of the existence of House Bill No. 199 which requires notice to the sponsor of a bill that becomes law that initial rulemaking implementing the bill has begun and request a status report informing the Committee as to what steps the Executive Branch agencies have taken to comply with the provisions of HB 199 at the next meeting
- Approved that staff write a letter to Secretary of State Mike Cooney requesting that a line item on the format of a rule be included to ensure agency compliance with the provisions of HB 199 and that the Secretary of State respond back to the Committee
- Approved that staff write a letter on behalf of the Committee to all state agency directors requesting that they review their rules and repeal any rules enacted under or implementing MCA sections repealed in the 1997 Session

March 20, 1998, Meeting

- Approved the minutes of the September 12, 1997, meeting
- Recommended a Committee bill that would amend the public notice requirements for air quality permits to conform them to the definition of "public notice" in 82-4-403, MCA
- Approved that Committee staff write a letter on behalf of the Committee to the Department of Environmental Quality that: (1) strongly admonishes the DEQ for its nonparticipation in the meeting and for its lack of interest in an issue that involves citizens of Montana; (2) states that the Committee believes that it was the intent of the Legislature and the Constitution to provide public hearings and to have parallelness in the administrative codes for the purposes of public hearings; and (3) states that DEQ should provide parallel rights to public hearings throughout its rules and regulations

- Approved that the Committee recommend: (1) that the Board of Outfitters reopen and promulgate rules which define “undue conflict” and develop standards for the decision of undue conflict; (2) that the Board continue to work with representative groups of interested persons and organizations to propose the standards and engage in public comment; (3) that the Board, under the guidelines set in Wallace v. Department of Fish, Wildlife, and Parks, defer any action on additional requests for NCHU expansion, within its ability to do so, until standards for review of undue conflict have been adopted; and (4) complete the revision of rules with all deliberate speed.

PART II

THE NEED FOR THE MONTANA ADMINISTRATIVE PROCEDURE ACT AND LEGISLATIVE OVERSIGHT OF ADMINISTRATIVE RULEMAKING

In Montana, as in most states, the state constitution provides that lawmaking is a function of the Legislature and declares that certain procedures must be used in order to enact laws.[1] Historically, it is also a recognized principle of state law that the Legislature may delegate the power to enact rules to the Executive Branch, composed of agencies that are themselves usually created by the Legislature.[2] This delegation of legislative authority to enact rules that are binding as law has its support not only in law but also in reason; the Legislature, being a part-time body and lacking expertise in the many varied purposes of state government, does not have the time, knowledge, and resources to adopt as statutory law the many detailed provisions needed to implement the statutes the Legislature enacts. To facilitate the administration of legislation, the Legislature authorizes rules that must be adopted pursuant to the requirements of MAPA.

Because of the MAPA definition of "agency", MAPA applies to most state agencies.[3] By its application, MAPA has standardized many functions of administrative agencies, the most important of which may be the rulemaking function delegated by the Legislature. As a result, persons dealing with state agencies need not obtain rulemaking information and copies of agency rules solely from the agencies themselves, nor must they distinguish between many different forms and styles of agency regulations. Furthermore, there is no longer a risk that an agency may have adopted rules in a manner unknown and undiscoverable by the general public. Under MAPA: (1) all proposed and adopted rules of every agency covered by MAPA must be printed in the Montana Administrative Register, which is published twice monthly by the Secretary of State; (2) interested persons must be given an opportunity to comment on proposed rules; and (3) adopted rules must be published in the Administrative Rules of Montana. Much good has resulted from these and other provisions of MAPA. The purpose and effect of MAPA, however, have sometimes been misconstrued. As the Administrative Code Committee noted in an earlier report to the Legislature,[4] MAPA itself has sometimes been blamed for the proliferation of agency rules and its repeal has sometimes been advocated as the cure to prevent the adoption of those rules. But as the Committee also noted in that report,[5] MAPA does

not grant rulemaking authority to state agencies, as the language of MAPA plainly states.[6] Rulemaking authority has instead been granted by the Legislature in individual sections of the law scattered throughout the Montana Code Annotated.

The number of statutory grants of rulemaking authority may surprise some people. There are hundreds of statutory sections delegating authority for agencies to adopt administrative rules. As the 1976 Committee report found, the statutory grants of rulemaking authority are often worded in a manner that provides little detail and guidance to executive agencies on the way in which rulemaking authority is to be exercised.[7] While a matter for concern, it is worth noting that statutory rulemaking grants must of necessity continue to be enacted. To address the problem of loosely worded and hastily considered delegations of rulemaking authority, the Legislature enacted Chapter 11, Laws of 1997, codified as 5-4-103, MCA, providing: “A statute delegating rulemaking authority to an agency must contain specific guidelines describing for the agency and the public what the rules may and may not contain.”

Since its creation in 1975, the Committee has sponsored other legislation to help strengthen the Legislature's influence over the rulemaking process.

Statements of legislative intent, hearings on agency rules, and similar "mechanical" devices, while certainly helpful, cannot be relied upon in all instances to ensure a legal implementation of legislative intent by the agency, much less the "best", most practical, or least expensive implementation. Whether because of oversight, inaccurate use of language, limited time allowed for legislative or committee action, or simple inability to foresee possible legal or economic consequences, it is almost impossible as a practical matter to frame grants of rulemaking authority and the statutes implemented by them in a manner acceptable to all interests. Hindsight must therefore be used, and legislative oversight becomes a practical necessity.

ENDNOTES

1. Article V, §1, Montana Constitution; Article V, §11, Montana Constitution.

2. See, for example, Chicago, M & St. P. Rv Co. v. Bd. of RR Comm'rs., 76 Mont. 305, 247 P. 162 (1926).

3. Sections 2-3-102 and 2-4-102(2), MCA; certain exceptions exist, such as the Governor and the Board of Regents.

4. Report of the Administrative Code Committee to the 45th Montana Legislature (December 1976), p.5.

5. Ibid., p. 7, which reads in part:

> . . . the committee has noted a widespread misunderstanding that the APA [Montana Administrative Procedure Act] is the cause of rules. to clear up any confusion on this issue, the committee has proposed language from the California statutes declaring that the APA can never be used as authority to adopt a substantive rule, and that rule [sic] adopted under authority of another statute must be reasonably necessary to effectuate the purpose of that other statute.

6. Section 2-4-301, MCA, provides:

> Except as provided in part 2 [which applies only to organizational and procedural rules], nothing in this chapter confers authority upon or augments the authority of any state agency to adopt, administer, or enforce any rule.

7. Report of the Administrative Code Committee to the 45th Montana Legislature (December 1976), p. 9.

PART III
THE REVIEW OF AGENCY RULES

The Administrative Code Committee is required by 2-4-402, MCA, to "review all proposed rules filed with the secretary of state", except rules proposed by the Department of Revenue. The review of rules by the Committee is conducted primarily to determine compliance with statutory requisites for valid rules. Under 2-4-305, MCA, a rule is not effective unless all of the following conditions are met:

(1) Each substantive rule adopted must be within the scope of authority conferred by the Legislature and in accordance with other statutory standards.

(2) The rule must be consistent with the implemented statute and must be reasonably necessary to carry out the purpose of the statute.

(3) The rule must substantially comply with the requirements of the law relating to the procedure for adoption (e.g., notice, hearing, and submission of comments on the rule).

To determine whether a rule complies with these statutory standards, the Committee reviews the statute authorizing rulemaking, the substantive law implemented by the rule, and the procedure used by the agency to propose or adopt the rule. The Committee reviews the rule for such additional considerations as clarity and style.

The review begins with a staff attorney analyzing the rule for substantive and procedural compliance with the statutes. If an error or problem in any proposed or adopted rule is discovered, the reviewing attorney notifies the agency concerned and recommends a solution. The staff attorney conducts a followup as necessary to determine subsequent agency compliance. If the agency disagrees with the staff comments and recommendation and the staff comments and recommendation are of a substantive nature and relate to an important problem, the matter is referred to the Committee. The Committee then may act on the matter by vote or Committee consensus.

Staff and Committee comments and recommendations generally fall into three major categories:

(1) The agency may lack statutory authority for the proposed rule, the rule may improperly interpret the language of the statute being implemented, the rule may be unnecessary to give effect to the statute implemented, or the rule may not have been adopted in substantial compliance with the procedural requirements of the Montana Administrative Procedure Act.

(2) The rule may improperly cite the authorizing statute or the statute implemented (although both types of statutes may in fact exist), improperly repeat statutory language, or contain ambiguous language.

(3) The rule may contain grammatical, spelling, or typing errors, which are usually brought to the attention of the agency so that they may be corrected. They are rarely brought to the attention of the Committee.

In the great majority of cases in which staff comments and recommendations are made, the agencies respond positively and remedy the situation by: (1) canceling the rulemaking proceeding altogether; (2) canceling the rulemaking proceeding and rule objected to and renoticing the rule in a different form; (3) amending the proposed rule in the subsequent notice of adoption; or (4) correcting minor errors in the ARM replacement pages.

During the past biennium, the staff attorneys' combined time spent reviewing rules was approximately 20 hours each week.

APPENDIX A

ADMINISTRATIVE CODE COMMITTEE'S POWERS

John MacMaster
Staff Attorney
Administrative Code Committee
May 1998

The following is a list of the ACC's various powers.

(1) Review the incidence and conduct of administrative proceedings under the Montana Administrative Procedure Act (MAPA). 2-4-402(3)(e), MCA. The exact words used are "administrative proceedings under this chapter". Since the chapter includes contested case procedures as well as rulemaking procedures, the committee may review the incidence and conduct of contested cases as well as the incidence and conduct of rulemaking. Both rulemaking and contested cases are "administrative proceedings under this chapter".

(2) Review all proposed rules that are subject to MAPA, except those of the Department of Revenue. 2-4-402(1), MCA.

(3) Require an agency proposing a rule to hold a hearing on the rule. 2-4-402(3)(c), MCA.

(4) Submit oral and written testimony at an agency's rulemaking hearing. 2-4-402(3)(b), MCA.

(5) Require an agency to prepare an economic impact statement regarding a rule proposal. As an alternative, the committee may contract to have an economic impact statement made. Notice of the economic impact statement and of where a copy can be obtained is published in the Montana Administrative Register (MAR). 2-4-405, MCA.

(6) Require an agency to publish the full or partial text of rule material adopted and incorporated by reference. 2-4-307(4), MCA.

(7) Obtain an agency's rulemaking records for the purpose of reviewing compliance with 2-4-305, MCA. 2-4-402(3)(a), MCA.

(8) Petition an agency for the adoption, amendment, or repeal of a rule. 2-4-315, MCA.

(9) Make a written recommendation to an agency for the adoption, amendment, or repeal of a rule. 2-4-402(3)(b), MCA.

(10) Make a written objection to an agency regarding a proposed or adopted rule. The agency must respond in writing. If the committee does not withdraw or substantially modify its objection, the committee may require publication of the text of its objection next to the rule in both the MAR and the Administrative Rules of Montana (ARM). After such publication, the agency has the burden, in any action challenging the legality of the rule, of proving that the rule was adopted in substantial compliance with 2-4-302, 2-4-303, and 2-4-305, MCA. 2-4-406, MCA.

(11) Delay the effective date of a new rule or of the amendment or repeal of a rule until the day after final adjournment of the next regular session of the legislature that begins after the rulemaking proposal notice was published in the MAR. 2-4-305(9) and 2-4-306(4)(c), MCA.

(12) Poll the legislature to determine whether a proposed rule is consistent with the legislature's intent in adopting the grant of rulemaking authority, the statute implemented by the rule, or both. The results of the poll are admissible in any court proceeding involving the validity of the rule. If a majority of both houses find that the proposed rule is contrary to the intent of the legislature, the rule is conclusively presumed to be contrary to the legislative intent in any court proceeding involving the rule's validity. 2-4-403 and 2-4-404, MCA.

(13) Make a recommendation to the legislature regarding an agency's grant of rulemaking authority. For example, the committee could recommend that the statute granting rulemaking authority be amended or repealed. 2-4-314, MCA.

(14) Under its inherent powers as a legislative committee, draft and introduce legislation relating to MAPA; an agency's grant of rulemaking authority; or an adopted, amended, or repealed rule.

(15) Petition an agency for a declaratory ruling on the applicability of a rule. The ruling is subject to judicial review, including review at the committee's request. 2-4-501, MCA.

(16) Seek judicial review of an emergency rule. 2-4-303, MCA.

(17) Institute, intervene in, or otherwise participate in proceedings involving MAPA or rules in the state and federal courts and administrative agencies. 2-4-402(3)(d), MCA.

(18) Require an agency to give the committee copies of documents filed in a proceeding involving the interpretation of MAPA or an agency rule. 2-4-410, MCA.

APPENDIX B

ADMINISTRATIVE RULES -- MAPA REQUIREMENTS
Outline for a Miniseminar
(March 1998)

Prefatory remarks: The Administrative Code Committee (ACC), its staff, and the functions of the ACC and staff. Rules are **not** reviewed by the Legislative Council or by the Legislative Services Division. They are reviewed by the ACC through Legislative Services Division attorneys assigned as staff attorneys to the ACC for rule review purposes.

Information and background reading

-- Read and study, and periodically reread, Title 2, ch. 4, parts 1 through 4, MCA, and the annotations to those parts. The annotations are contained in a publication entitled "Montana Code Annotated (Annotations)". This is not the same publication as the "Montana Code Annotated".

-- Chapters 2 and 3 of the Legislative Council's Bill Drafting Manual can be consulted on grammar, punctuation, capitalization, and other matters of style and English usage. .

--- Review the Montana Attorney General's Model Rules, including the Appendix of Sample Forms. These are contained in Title 1 of the Administrative Rules of Montana (ARM). They contain various helpful aids and formats for rules work.

-- The staff of the Administrative Rules Bureau of the Secretary of State's office is a good source of information as to rules formats and the process of filing rule proposal and adoption notices.

-- The Legislative Services Division staff attorney assigned as the ACC staff attorney, and any other Legislative Services Division attorney, will help you with your questions and problems regarding procedure, process, format, substantive matters, or other matters.

Definition of administrative rule

-- See 2-4-102(11) and (13), MCA.

Agencies and rules subject to the Montana Administrative Procedure Act (MAPA)

-- See 2-4-102(2) and (11), MCA. Taken together, the definitions of "agency" and "rule" will tell you which agencies and which rules are subject to MAPA. Some agencies are exempt as to all their rules, and some agencies are exempt as to some of their rules.

Legislative delegation of rulemaking authority

-- The Legislature has the power to delegate to the Executive Branch agencies the authority to adopt, as law, administrative rules. Without such a delegation, an agency has no authority to adopt rules.

-- Some reasons why a delegation of rulemaking authority may be necessary or desirable:

- The Legislature lacks expertise in the particular field of law.
- The field of law involved is too complex, too broad, or too narrow and obscure for the Legislature to be able to enact as statutes what an agency can adopt as rules.
- The administrative agency that will administer a statute and implement it by rules has an abundance of expertise or much more expertise than the Legislature, and it is better that the agency adopt rules than that the Legislature attempt to completely cover the area by statute.
- There is a necessity for ongoing compliance with federal law that the state must follow, or has to follow to get federal funds, which necessitates periodic rulemaking more often than the Legislature meets.
- The field of law does not easily lend itself to regulation completely by statute.
- The field of law is a fast-moving one, and the law must be constantly updated. The Legislature does not meet often enough to itself do the updating, which must therefore be done by rulemaking.
- The legislative process results in a bill granting rulemaking authority because the Legislature does not have the time, or the inclination, to

completely flesh out a concept or program, or a compromise results in a vague or incomplete law that must be fleshed out by rule.

MAPA does not grant authority for substantive rules

-- See 2-4-301, MCA. Section 2-4-201, MCA is authority only for the types of procedural rules mentioned in that section. It does not grant authority for substantive rules. See 2-4-102(13), MCA, for the definition of "substantive rules".

Key sections for rulemakers

-- Persons formulating, writing, and filing rule proposal and adoption notices should pay particular attention to 2-4-302, 2-4-303, and 2-4-305 through 2-4-307, MCA, and the annotations to those sections. A proposal notice is a written document, filed with the Secretary of State, containing a proposal to amend, adopt, or repeal rules. An adoption notice is a written document filed with the Secretary of State that adopts (with or without changes in what was proposed) that which is contained in a proposal notice. Examples of proposal and adoption notices are contained in the Appendix to the Attorney General's Model Rules.

Statutory authority for rules

-- Rules are laws. The adoption of rules is the exercise of a power that is primarily granted by the Montana Constitution to the Legislature, that is, the power to pass laws. A rule cannot be adopted unless the Legislature has, by statute, granted the agency authority to adopt rules in an area of statutory law that the rule pertains to and implements. Such a grant by the Legislature of authority to legislate laws (adopt rules) is typically contained in an MCA section that provides that "The department may (or shall) adopt rules to implement this chapter (or this part or sections___ through___)". Under 2-4-305(3), MCA, each new rule or amendment of a rule must cite the MCA section that is authority for the rule. An agency may not adopt a rule unless an MCA section clearly grants authority to adopt the rule and the rule implements a particular MCA section or sections.

Implementation of MCA sections

-- Each new rule or amendment of a rule must implement one or more sections of the MCA and must cite the implemented section or sections.

-- "Implement" a section means to flesh it out, explain it, further or fulfill its purpose, make it work or work better, interpret it, or carry it into effect. A rule that is not in some such way related to at least one MCA section is invalid.

-- Under 2-4-305(3), MCA, a substantive rule or rule amendment may not be proposed or adopted unless: (1) **a statute granting authority to adopt rules clearly and specifically lists the subject matter of the rule** as a subject upon which the agency has authority to adopt rules; or (2) the rule implements and relates to **a subject matter or an agency function that is clearly and specifically included in a statute to which the grant of rulemaking authority extends**.

Consistency (and conflicts) with MCA

-- Each rule or rule amendment must be consistent with, and not in conflict with, the MCA section or sections that it implements and all other statutory and constitutional law, including applicable federal law. A rule can never override a provision of a statute or constitution.

-- A rule cannot add to a statute a provision or additional requirement not envisioned by the Legislature. See the 2-4-305, MCA, annotations case notes from the following cases: McPhail v. Mont. Bd. of Psychologists, Bd. of Barbers v. Big Sky College of Barber-Styling, Michels v. Dept. of Social and Rehabilitation Services, and Bell v. St.

Statements of reasonable necessity for rules

-- Section 2-4-302(1), MCA, requires a rule proposal notice to include a rationale for each proposed rule amendment or new rule. It also requires that the rationale be written in plain, easily understood language (do not use bureaucratic or technical jargon that John Q. Public may not be able to understand).

-- Under 2-4-305(6), MCA, a proposed rule amendment or new rule must be reasonably necessary to effectuate the purpose of the statute that is to be implemented by the proposal. The fact that a statute mandates the adoption of rules establishes the necessity for a proposed rule amendment or new rule but does not, standing alone, constitute **reasonable** necessity for the proposal. The agency must clearly and thoroughly demonstrate the reasonable necessity for each rule amendment, each new rule, and each repeal of a rule. The demonstration must be contained in the proposal notice and in the written and oral data, views, comments, or testimony submitted by the public or by the agency and considered by the agency. In demonstrating the reasonableness component of the showing of reasonable necessity, the agency must state the principal reasons and the rationale for the proposed rule amendment or new rule and for the particular approach that the agency proposes to take in exercising its rulemaking authority and in implementing the statute.

-- Reasonable necessity and rationale are similar, but the former includes the latter and is a stiffer test to meet. If you adequately show reasonable necessity, you have an adequate rationale.

-- The rule amendment or new rule must be necessary to implement the statute, and the necessity must be reasonable. State as explicitly and clearly as you can why the rule is needed. Do not be afraid to be lengthy. Do not merely state what the rule provides or does or covers. An explanation of **what** the rule amendment or new rule does is not an explanation of **why** the rule amendment or new rule is needed. If you start by asking yourself who wants the rule amendment or new rule and exactly why it is wanted, you will usually be able to formulate the reasonable necessity for the rule amendment or new rule. However, remember that the reason must be a reasonable one and a good one and must constitute necessity for the rule.

-- You can: (1) separately state the reasonable necessity for each rule amendment or new rule; (2) have a number of separate reasonable necessity statements, each of which covers two or more rule amendments or new rules; or (3) have a reasonable necessity statement that covers all the rules in the proposal notice. However, if you proceed under (2) or (3) above, make sure that each reasonable

necessity statement is adequate and complete enough to cover the multiple rule amendments and/or new rules.

-- You can either insert a reasonable necessity statement at the end of each rule amendment or new rule or place the statements for all the rule amendments and/or new rules after the last rule amendment or new rule.

-- Examples of reasonable necessity:

- The rule amendment or new rule is needed to conform Montana law to federal law or to receive federal funds.
- The rule amendment or new rule is needed to make Montana law uniform with that of other states.
- Rules regulating mirrors on school buses are necessary because investigation shows that three recent school bus accidents were caused by faulty mirrors, improperly placed mirrors, not enough mirrors, or other problems with mirrors.
- Rules are necessary to provide a procedure by which the public can apply for or receive something from, or otherwise interact with, the agency and to ensure due process.
- A rule is being amended to delete a conflict with a statute.
- Fees are changed to make them commensurate with costs.
- The rule amendments and/or new rules are needed to conform them to recent legislative enactments.
- A majority of those affected by the rule amendment or new rule agree that experience and studies by experts show that the rule amendment or new rule is necessary to protect the public health, safety, or welfare.
- Standards contained in a rule and generally accepted nationwide are being updated because the current standards are obsolete or are no longer state-of-the art.
- The rule amendment or new rule is needed to ensure fair competition and reduce unfair trade practices that have frequently occurred.
- Documented instances of incompetent or substandard work show that rules are necessary to reduce such occurrences.

Subsections (1) and (2) of 2-4-305, MCA

-- The requirements of these two subsections are often overlooked. Be sure that you are familiar with and comply with these subsections.

-- It is not just written and oral submissions at a hearing that must be considered (and answered, in the adoption notice, if the submission opposes the rule proposal). Submissions that are mailed, phoned, faxed, or submitted to the agency in any other manner must be dealt with.

-- A comment by ACC staff (which is any Legislative Services Division attorney who reviews a proposal notice) must be answered in the adoption notice.

Hearings on rule proposal notices

-- Section 2-4-302(4), MCA, states the instances in which a hearing must be held. Familiarize yourself with them. One of these instances is when the proposal involves matters of "significant interest to the public". That term is defined in 2-4-102, MCA, as "agency actions under this chapter regarding matters that the agency knows to be of widespread citizen interest. These matters include issues involving a substantial fiscal impact to or controversy involving a particular class or group of individuals. The term does not extend to contested cases". This is a very broad definition. If a proposal notice fits within this definition, a hearing must be held. An agency should consider the benefits of erring on the side of holding hearings on proposals that perhaps do not fit within this definition rather than not holding hearings on proposals that do not appear to the agency to involve matters of significant interest to the public. If hearings are held when they perhaps are not required by the "significant interest to the public" requirement, money and time are spent by the agency when they did not have to be (although this is at least partially offset by allowing the public to have its say at a hearing and the public relations benefit of doing that). However, if a hearing is not held on a matter that is in fact of significant interest to the public, the adopted rule amendments and/or new rules are subject to invalidation by a court upon the court's finding that the proposal was indeed of significant interest to the public.

Persons who must be given notice of a proposal

-- See 2-4-302(2) and (3), MCA, for persons who must be given notice of the proposal notice.

-- Section 2-4-302(2), MCA, requires notice at another, earlier, point in time. It requires that the **first time** that an agency proposes to implement a statute with one or more rule amendments or new rules, the agency must, **at the time that its personnel begin to work on the substantive content and the wording of the initial rule proposal**, notify the sponsor of the legislative bill or bills that enacted the MCA section to be implemented. In other words, with respect to a statute that has not yet been implemented by rules, when agency staff decides that rule amendments or new rules are necessary to implement the statute and starts to work on the wording of the rules, it is at that time that the agency must notify the sponsor of the bill that enacted the section to be implemented.

-- Section 2-4-302, MCA, states who must receive a proposal notice, in addition to filing it with the Secretary of State. It also requires the proposal notice to be posted on the state electronic bulletin board or other electronic communications system available to the public. Since state government has an Internet website home page for state government, that's where you must post it--under your agency's page under the Montana government home page.

Adoptions by reference

-- See 2-4-307, MCA. Review that section and the Model Rules when you intend to adopt rules or standards by referring to them in the adopting rule and stating that they are adopted and incorporated by reference.

-- You must adopt a particular version of the adopted material, which is clearly specified in the rule. Refer to, for example, the 1998 edition of the Code of Federal Regulations; the 1998 edition of the Uniform Fire Code, including the Fall, 1998 amendments; or the U.S. Stockgrowers Association publication F-98, published in 1998, on proper fencing. A rule cannot say, for example, that it adopts all future amendments to or new editions of the rules or standards that are incorporated by reference. If you wish to adopt future amendments, you must do so specifically in a new rule amendment proposal notice that refers to the amendments adopted or to the amended version or new edition of the rules or standards that are incorporated by a reference to them.

Time periods

-- See 2-4-302, MCA, for various time period requirements.

-- You must give a least 20 days' notice of a hearing, and the notice period begins on the date of publication of the notice in the Montana Administrative Register (MAR).

-- You must allow at least 28 days from the date of publication of a proposal notice in the MAR for interested persons to submit data, views, or arguments, orally or in writing. Note that oral submissions are permitted and that they are not limited to rules for which there is a hearing. Consequently, if John Q. Public calls an agency staffer involved with a rule proposal and makes comments over the phone, they should be noted, and they should be considered by the staffers ultimately in charge of deciding what will and will not be in the rules. If the comments are against something in the rule proposal notice, they must be responded to in the adoption notice (see 2-4-305(1), MCA).

-- An adoption notice must be published in the MAR no less than 30 days or more than 6 months after the publication date of the proposal notice. See 2-4-302(2)(c) and (3) and 2-4-305(7), MCA.

Effective date of rules

-- This is governed by 2-4-306, MCA. A rule amendment, new rule, or repeal of a rule is effective on the date that the adoption notice is published in the MAR. However, if you wish, you may, in the adoption notice and in the history that appears at the end of the rule, specify a later effective date.

-- A temporary rule or emergency rule is effective at the time that its adoption notice is filed with the Secretary of State or at a later date stated in the rule's history and in the adoption notice.

Emergency rules and temporary rules

-- These are not normally needed. They are governed by 2-4-303 and 2-4-306(4)(b), MCA. Contact the ACC staff attorney if you have any doubts or questions.

Retroactive rules

-- A retroactive rule or rule amendment is one that applies backward in time, as if the retroactive rule had already been in effect at that past time. Such a rule is not usually necessary. It will be carefully reviewed by ACC staff. You should not be adopting a rule and making it retroactive simply because you, for whatever reason, did not get around to proposing and adopting it at the point in time in the past when you should have proposed and adopted it (though that will not necessarily invalidate the retroactivity of the rule). MAPA does not address retroactive rules, but it has always been the policy of the ACC and its staff that reasonable retroactivity is probably allowable under MAPA. This policy is supported by case law, although there is no Montana case law on the subject.

Guerrero v. Adult and Family Services Div., 67 Or. App. 119, 676 P.2d 928 (1984), an Oregon case, held that administrative rules may be applied retroactively **if it is reasonable under the circumstances**, but that retroactive application of a rule is not favored by the court if the rule does not specifically state that it is retroactive.

In addition to this reasonableness test, there is the test under an Illinois case, Shapiro v. Regional Bd. of School Trustees of Cook County, 71 Ill. 915, 116 Ill. App. 3d 397, 451 N.E.2d 1282 (1983). That court held that in determining whether a rule may be made retroactive, the test is whether the question or problem or issue is one that never arose before, whether the rule is an abrupt departure from well-established practice, the extent to which a party adversely affected by the rule relied on the former rule, the degree of burden on that party, and whether there are significant statutory interests involved that counterbalance any hardship to that party.

The U. S. Supreme Court has used various tests over the years and has not settled on one litmus test. The tests used include the balancing of interests test, the test of whether the retroactivity will work a manifest injustice to a person the rule applies to, the test of whether the retroactive application benefits the party its applied to, the test of whether the rule is procedural or

substantive, and the test of whether the affected rights of a party the retroactivity is applied to are mature or perfected.

In Georgetown University Hospital v. Bowen, No. 86-5381, 6/26/87, a federal agency rule was invalidated by the U.S. Court of Appeals for the District of Columbia because the rule was not proposed and adopted in compliance with the federal Administrative Procedure Act. The court held that when the same rule was later validly proposed and adopted in compliance with the Act, the rule could not be made retroactive to the time that the invalid rule would have taken effect had it not been invalidated. The court held that to do so would make a mockery of the Administrative Procedure Act by allowing an agency to ignore the Act with impunity and cure the agency's invalid actions by later validly proposing and adopting the rule, and making it retroactive, if the agency is caught.

Section 1-2-109, MCA, provides that "No law contained in any of the statutes of Montana is retroactive unless expressly so declared" in the statute. In view of this MCA section, it is reasonable to suppose that the same requirement applies (and may be applied by the Montana Supreme Court) to rules. Thus, an agency that plans to apply a rule amendment or a new rule retroactively should state in the rule or amendment that it is retroactive and what, or when, its retroactive to.

In addition, the agency should include in the reasonable necessity statement in the proposal notice a clear and detailed statement of why the rule is being made retroactive.

If you have doubts or questions, contact the ACC staff attorney.

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